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No. 00-256

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

RENATO P. MARIANI,

Petitioner,

—v.—

UNITED STATES OF AMERICA and
FEDERAL ELECTION COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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The Government's response to the petition offers no suggestion that the issues raised are not of the highest level of importance. Indeed, the issue of whether the corrosive impact of corporate funded, unlimited soft money spending by political parties prevents the Federal Election Campaign Act from materially advancing its goals is at least as significant as that of whether unlimited, coordinated hard money expenditures by political parties frustrates the purposes of the Act—the issue that is presented by and will be considered by this Court in *FEC* v. *Colorado Republican Federal Campaign Committee*, No. 00-191, *cert. granted*, 69 U.S.L.W. 3249 (U.S. Oct. 10, 2000) ("*Colorado Republican II*"). That is precisely because corporations can and do participate—in unlimited amounts—in the soft money campaign finance system but cannot participate in the hard money campaign finance system.

In this reply, we urge this Court to grant the writ of certiorari, to set the case for argument with *Colorado Republican II* or, at the least, to defer consideration of the petition until *Colorado Republican II* is decided.

I. THE COURT SHOULD GRANT THE WRIT AND SET THE CASE FOR ARGUMENT WITH *COLORADO REPUBLICAN II* OR, AT THE LEAST, DEFER CONSIDERATION OF THE PETITION UNTIL *COLORADO REPUBLICAN II* IS DECIDED

According to the Government, this Court's decision in *Colorado Republican II* is "unlikely to affect the proper disposition of the instant case." Resp. 15. In support of that claim, the Government argues that the respondent in *Colorado Republican*—the Colorado Republican Federal Campaign Committee—does not challenge individual contribution limits, the ban on corporate contributions or the constitutionality of any of FECA's disclosure

requirements there. *Id.* The Government's words are carefully chosen. As a review of the *Solicitor General's* briefs to this Court urging that a writ of certiorari should issue in *Colorado Republican II* reveals, the issues in the two cases are now inescapably intertwined.

Colorado Republican II raises the question of whether a political party may engage in unlimited spending of hard money in coordination with candidates of its choice. The Court of Appeals held that FECA's limits on such spending were unconstitutional because the statute did not directly advance the Government's interest in preventing corruption or the appearance of corruption. 213 F.3d 1221, 1232-33 (10th Cir. 2000). According to the Tenth Circuit, unlimited coordinated hard money spending by political parties is not potentially corruptive because a candidate cannot be corrupted by his or her party regardless of the actual source of the funds. *Id.* at 1230-31.

The FEC argues in *Colorado Republican II* to the contrary, maintaining that unlimited coordinated hard money spending by political parties corrupts the political process and that the ban on such spending thus significantly advances the government's asserted interests. According to the FEC's petition, political parties do not act as a buffer between large donors and candidates. In support of this view, the Government relies on testimony by Senators, Congressmen and other political experts to the effect that candidates are well aware of—and are influenced by—large donors to political parties. *Colorado Republican II* FEC Pet. at 20-21 & nn.8-9; *see id.* at 11.

This very evidence—indeed the very same affidavits—was stipulated to in this case. FOF 10(e),(f) & (h)-(n) (App. 53a-56a). Those affidavits and the FEC's "Statement of Material Facts Not in Genuine Dispute" in *Colorado Republican II* were admitted by the *Mariani*

district court, *id.*; FOF 15 (App. 58a), and extensively credited and relied on by it in its findings.[1] This evidence was offered by petitioner to demonstrate that political parties do not provide a buffer between large corporate donors and the party's candidates and that hence (as the district court found based on the FEC's submissions in *Colorado Republican*), "[m]oney passing through the party committees and spent on behalf of candidates is not cleansed of either the giver's identity or interests." FOF 226 (App. 115a). If this Court were to find, as the FEC urges in *Colorado Republican II*, that the party does not "break th[e] chain" of actual or perceived corruption, FEC Pet. at 24, the very foundation of the Third Circuit's opinion in this case crumbles and its decision cannot stand.

Nor is the issue of the impact of soft money on the constitutionality of sections of FECA absent from *Colorado Republican II*. In the FEC's Reply Brief in *Colorado Republican II*, the Solicitor General wrote:

> [T]he absence of any federal limit on "soft money" donations increases the corruptive potential of party coordinated expenditures, even though the coordinated expenditures themselves are made with "hard money." See Pet. 23-24. A party committee may direct its coordinated expenditures to candidates favored by a substantial "soft money" donor, and may use those coordinated expenditures to induce the candidate (once elected or reelected) to look favorably upon that donor's interests. *Ibid. The existence of that danger is surely relevant to the question whether 2 U.S.C. 441a(d) serves the gov-*

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[1] *See* FOF 86, 174, 175, 200, 201, 202, 210, 216, 217, 218, 220, 221, 222, 223, 224, 226, 227, 229, 232, 243, 251, 333, 334, 335, 337, 345, 351, 365, 381, 384, 385, 386, 387, 388, 389 and 396.

> *ernment's interest in preventing the fact or appearance of political corruption.*

Colorado Republican II Pet. Reply 2 (emphasis added). Should the Court credit that argument and rule that the effect of soft money is to undermine "the government's interest in preventing the fact or appearance of political corruption," *id.*, it would greatly advance—if not dispositively establish—the correctness of petitioner's identical claim in this case that the FECA provisions at issue here do not materially advance the Government's interest in preventing the fact or appearance of political corruption.

Another central argument made in this case is that the flat ban on corporate contributions is unconstitutional because the problem sought to be dealt with by the ban—*i.e.*, the reality and appearance of corruption—stems only from large contributions, not modest ones. Pet. 24. In its petition in *Colorado Republican II*, the FEC stated:

> The premise of the FECA contribution caps is not that a private person's "influence" with government officials is per se illegitimate. Rather, the premise is that such influence should not be based on large infusions of money.

Colorado Republican II Pet. 19 (emphasis added); *see also id.* at 16-17 (referring to dangers of "large contributors," "large-scale contributions," "large contributions," "large coordinated expenditures" and "large campaign contributions"). Once again, should the Court credit the FEC's argument to this effect in *Colorado Republican II*, it will plainly be of enormous relevance to Mr. Mariani's claims on the merits.

Petitioner respectfully submits that the Court should grant the writ in the instant case and set it for argument with *Colorado Republican II*. At the least, the Court

should defer consideration of this case until the ruling in *Colorado Republican II* is issued.

II. THE IMPACT OF THE EXPLOSION OF SOFT MONEY ON THE CONSTITUTIONALITY OF SECTIONS 441B AND 441F WARRANTS THE ATTENTION OF THIS COURT

The district court's factual findings depict a system inundated with soft money—a state of affairs which, as explained in Part I of the petition, so undermines the effectiveness (and, as a result, the constitutionality) of the challenged statutes that review by this Court is warranted. The Solicitor General does not dispute the reality of the carnage wrought by unlimited soft money donations on the functioning of the FECA. Indeed, as we have already pointed out, it is the FEC *itself* that is the source of much of the data proving that the statute does not materially advance its purposes. Instead, the Government's response unsuccessfully relies on case law written before the soft money explosion.

Arguing that the validity of the corporate contribution ban in 2 U.S.C. § 441b has already been established, the Government relies on *FEC* v. *National Right to Work Committee*, 459 U.S. 197 (1982), *FEC* v. *National Conservative Political Action Committee*, 470 U.S. 480 (1985) and *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652 (1990). While these decisions indicate that significant restrictions on corporate contributions or expenditures are constitutional, this Court has never upheld a flat ban on all corporate contributions; it has never upheld the constitutionality of the statutory provisions at issue here; and it has never even had cause to address the arguments made by petitioner, let alone to do so in a case with such a fully developed factual record.

Thus, *National Right to Work Committee*, 459 U.S. at 198, addressed "whether [respondent NRWC] limited its solicitation of funds to 'members' within the meaning of 2 U.S.C. § 441b(b)(4)(C)," which provides that non-stock corporations may only solicit contributions for their separate segregated funds from their "members." The Court determined that the concept of "membership" required more than a passing interest in the organization (and that therefore the NRWC had violated the statute) and held the statute constitutional as so construed.

In dicta, the Court in *NRWC* spoke broadly about § 441b as a whole, but it did so before the rise of soft money and issue advertising which, as the district court found (with considerable assistance from the pronouncements of the FEC in *Colorado Republican II*) "have essentially rendered the contribution and spending limits of FECA meaningless"; and it did so before it became "impossible for the laws . . . to have any real impact in terms of avoiding the appearance of corruption or avoiding undue influence by large accumulations of wealth." FOF 398 & 400 (App. 176a-177a).

National Conservative Political Action Committee, 470 U.S. 480, upheld a $1,000 limit on political committee expenditures in support of candidates who elect to accept public financing. To the extent *NCPAC* addressed corporate contributions, it merely stated (as we agree) that it is permissible to "regulate" them. *Id.* at 495.

Likewise, in *Austin*, 494 U.S. 652, the Court was not presented with either the statute before this Court or the arguments or factual findings made in this case. Moreover, *Austin*, commenced in 1985, was decided before soft money inundated the campaign finance system, "eviscerat[ing] the contribution limits and disclosure requirements in federal election laws." FOF 407 (App. 178a).

The Government correctly urges that Congress may take incremental steps toward eradicating a problem and need not solve it entirely. Resp. 10-11. But as this Court has repeatedly held, when statutes seek to restrict protected speech, the First Amendment will not countenance *ineffectual* restrictions. "[W]here important First Amendment interests are at stake . . . [a selective ban] simply cannot be defended on the ground that partial prohibitions may effect partial relief." *Florida Star* v. *B.J.F.*, 491 U.S. 524, 540 (1989). Ultimately, "a law cannot be regarded as protecting an interest 'of the highest order,' " as a law suppressing speech must in order to be deemed constitutional, "when it leaves appreciable damage to that supposedly vital interest unprohibited." *Id.* at 541-42 (Scalia, J., concurring).

Finally, respondents argue that since soft money is subject to less control by the candidates than hard money, "the practical distinctions between hard and soft money provide ample justification for Congress's decision to treat the two differently." Resp. 11. But as the district court's findings in *Mariani* (rooted, once again, in concessions of the FEC and its witnesses) demonstrate, this technical distinction is negligible. The reality, as the district court found, is that the option of donating unlimited sums of soft money permits corporations "to do that which the corporate hard money contribution ban is intended to avoid: corporate support of candidates for federal elective office." (App. 181a).

Ignoring this reality, respondents rely on *dicta* in this Court's earlier ruling in *Colorado Republican Federal Campaign Committee* v. *FEC*, 518 U.S. 604, 616-17 (1996) ("*Colorado Republican I*"), stating that "[u]nregulated 'soft money' contributions may not be used to influence a federal campaign, except when used in the limited, party-building activities specifically designated in the statute." Resp. 11. That, indeed, was the way

FECA was crafted but, as the FEC well knows, and as the district court determined in the FEC's own words, today "[n]ational party committees use large soft money contributions in ways that unavoidably influence federal elections." FOF 404 (App. 177a).

As for § 441f, respondents contend that the section deters circumvention of FECA's substantive limits. Resp. 13. While the primary goal of § 441f is to prevent donors from circumventing FECA's substantive limits, *see Goland* v. *United States*, 903 F.2d 1247, 1251 (9th Cir. 1990), the record demonstrates that under the current system, these limits are futile since both corporations and individuals give millions of soft dollars that they are barred from giving in hard dollars. FOF 31, 42-47, 62-65 (App. 61a, 65a-66a, 69-73a).

The Government also claims that § 441f serves the interest of disclosure. Resp. 13. However, the conduit provision fails to achieve this goal as well. *See Nixon* v. *Shrink Missouri Government PAC*, 120 S. Ct. 897, 914 (2000) (Kennedy, J., dissenting) (by creating the soft money loophole, "[t]he Court has forced a substantial amount of political speech underground, as contributors and candidates devise ever more elaborate methods of avoiding contribution limits . . ."). In fact, § 441f does not apply to soft money, and consequently soft money donors can give unlimited sums through intermediaries while avoiding scrutiny under § 441f. *See* Pet. 20.

III. THE QUESTION OF WHETHER A FLAT BAN ON CORPORATE CONTRIBUTIONS UNCONSTITUTIONALLY CURTAILS CORPORATE DONORS' FIRST AMENDMENT RIGHTS WARRANTS CONSIDERATION BY THIS COURT

While the parties agree that Congress may restrict the rights of corporations to contribute political contributions, the petition raised the distinct issue of whether a

limit of *zero* dollars is an unacceptable restriction under *Buckley*. *See* Pet. Part II. The Government's principal response—that *Buckley* v. *Valeo*, 424 U.S. 1 (1976), involved people, not corporations, and that Congress may constitutionally bar the latter's contributions (Resp. 12-13)—simply dodges the important issue facing this Court of whether the First Amendment and *Buckley* require that at least modest contributions be permitted.[2]

IV. THE ISSUE OF WHETHER A COURT OF APPEALS MUST GIVE DEFERENCE TO A DISTRICT COURT'S FACTUAL FINDINGS IN DETERMINING THE CONSTITUTIONALITY OF A PROVISION OF THE FECA WARRANTS THE CONSIDERATION OF THIS COURT

The court of appeals ignored all established precedent interpreting 2 U.S.C. § 437h by declining to defer to the district court's extensive findings of fact. *See* Pet. Part III.[3] The Government maintains that the only findings to which the court did not defer were actually conclusions of law or "legislative" facts. But the court stated without qualification that:

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[2] Respondents also attempt to cast the FECA provisions regarding political action committees as permitting "individuals affiliated with [corporations]" to engage in political activity "under the sponsorship of their corporation." Resp. 2. However, while PACs are permitted to contribute to federal candidates, they are not permitted to contribute a single penny of corporate funds. 2 U.S.C. § 441b(b)(4)(A)(i).

[3] As noted in the petition, the refusal of the Court of Appeals to give any deference to the district court's fact-finding is particularly astonishing since the parties agreed to 117 stipulated facts and were "in remarkable agreement as to the accuracy of on overwhelming majority of the additional statements of facts" proffered by each side. (App. 47a).

> Our review of the district court's findings, made in a setting outside the traditional adversary crucible, is not deferential.

(App. 4a). And the Government's attempt to discredit the district court's findings is also inapt. The district court, after reviewing a vast amount of evidence and hearing extensive argument, appropriately found facts and certified the legal issues as it was "required" to do, *Bread Political Action Committee* v. *FEC*, 455 U.S. 577, 580 (1982); that it drew certain overarching factual conclusions based on its findings does not make them rulings of law.

CONCLUSION

The petition for a writ of certiorari should be granted.

October 25, 2000

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